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No. 02-1541

In The
Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

FELIPE EDGARDO TOVAR,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Iowa

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. A GUILTY PLEA COLLOQUY CONVEYS SUFFICIENT INFORMATION TO ALLOW A DEFENDANT TO ACT WITHOUT A LAWYER; THE SIXTH AMENDMENT DOES NOT REQUIRE A SEPARATE LITANY EMPHASIZING THE ADVANTAGES OF AN ATTORNEY TO WAIVE THE ASSISTANCE OF COUNSEL.

The parties appear to agree that knowledge of "relevant circumstances and likely consequences" forms the touchstone for waivers of counsel at a guilty plea. *See, e.g.*, *Brady v. United States*, 397 U.S. 742, 748 (1970); Resp. Br. 10. Tovar asserts, incorrectly however, that the Sixth Amendment requires the litany crafted by the Iowa Supreme Court to ensure knowledge of the right to, the usefulness of, and the dangers of forgoing plea counsel. Resp. Br. 12-17; *see also* Br. of *amicus* National Association of Criminal Defense Lawyers 5-12 (NACDL). The Iowa Supreme Court held the Sixth Amendment requires plea courts to advise defendants there are defenses generally unknown to lay persons, the danger in waiving counsel is that a viable defense will be overlooked, and without consulting an attorney a defendant loses an independent opinion on the wisdom of pleading guilty. Pet. for *Certiorari* App. 18 (Pet. App.). Principle and precedent do not support this conclusion.

A. The modern plea colloquy alerts a defendant about the areas which an attorney would advise: the evidence, the decision to plead guilty, and the sentence.

This Court has not held that the validity of the waiver of counsel turns on an explanation of the role a lawyer

plays in any particular stage of the proceedings, except arguably insofar as advising a defendant of an attorney's superior ability with respect to trial procedure. *Compare Patterson v. Illinois*, 487 U.S. 285, 293-94 (1988) *with Faretta v. California*, 422 U.S. 806, 808 n.2, n.3, 835 (1975). Neither does this Court's plurality decision in *Von Moltke v. Gillies* compel a discussion of the role of plea counsel. *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948). *Von Moltke* turned as much on the plea court's failure to examine the factual basis for the plea as it did on the defendant's misunderstanding of what made her guilty. *Id.* at 727-28, 729 n.1.

Rather, this Court has held that a statement of the ultimate adverse consequence of waiver at the proceeding informs a defendant of an attorney's usefulness and the dangers and disadvantages of proceeding alone. *Patterson*, 487 U.S. at 293-94. Modern plea colloquies such as Iowa Rule of Criminal Procedure 2.8(2)(b) or Federal Rule of Criminal Procedure 11(b) serve that function.

From the plea colloquy, the defendant knows the direct consequences of pleading guilty without counsel; the range of punishment and that sentencing is in the judge's hands alone. Pet'r Br. App. 1-2; J.A. 20-21. The defendant knows that to stand without counsel and plead guilty means losing the advantages of fair trial guarantees, including the presumption of innocence and the availability of compulsory process. *See* Pet'r Br. App. 1-2; J.A. 15-19. Fully informed of the charge and its punishment, the defendant knows the admission will lead to conviction. The defendant further knows he is forgoing a challenge to the elements or the evidence supporting them – and what exactly the State's evidence would show. Pet'r. Br. 1; J.A. 23-24.

Since neither the decision to waive counsel nor the choice to plead guilty is final until the end of the hearing, the defendant knows generally what an attorney would advise him about: the evidence supporting guilt, the decision to plead guilty, and the likely sentence. *See* J.A. 9, 19, 27-28 (court asking defendant what plea he wished to enter and later asking twice more if that was still his desire).

B. The specific litany devised by the Iowa Supreme Court is not necessary to appreciate the procedural functions of counsel at a plea hearing.

Tovar and the NACDL also miss the mark in their proposition that the Sixth Amendment requires the litany crafted below because a layperson often does not fathom the role of counsel. Resp. Br. 15, 20-21; Br. for *amicus* NACDL 5-10. While some people may not know *how* lawyers serve their clients, a reminder of this fact is neither required by the Sixth Amendment nor necessary to ascertain a valid waiver of counsel.

Criminal defense attorneys serve procedural and substantive functions. Lawyers can manage the criminal proceedings so that their clients are not prejudiced by, for example, poorly lodged or miss-timed evidentiary objections, biased jurors, or improper sentencing factors. The most procedurally demanding setting – a trial – suggests a detailed waiver colloquy over the "dangers and disadvantages" of conducting one's own trial makes sense. *Faretta*, 422 U.S. at 835. But in *Faretta*, the Court focused its attention on the historically entrenched notion that lay people lack the skill or knowledge to deal with rules of evidence or trial practice to present a defense. *See id.* at

833 n.43 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)). In a plea hearing, however, the dangers and disadvantages of self-representation are more obvious because the plea procedure is so much simpler.

Here, no one contends that the plea procedure itself goes beyond the ken of the lay person. Indeed, if the process of a plea hearing confuses a defendant (i.e., the defendant does not grasp what will happen at a guilty plea hearing), the court would have to explain how guilty pleas are entered until the defendant understands. *Cf. Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993) (noting "purpose of 'knowing and voluntary' inquiry ... is to determine whether the defendant actually does understand the significance and consequences" of waiving counsel). As such, *Faretta*, the only case arguably supporting a discussion of the procedural tasks of counsel, does not support an extensive cautionary litany in the modern plea context.

C. For at least five reasons, the litany crafted crosses an important line and unnecessarily addresses the substantive role of counsel.

The litany imposed by the Iowa Supreme Court, which Tovar and the NACDL defend, addresses the substantive role counsel plays and crosses an important line.

Defense counsel can serve an important substantive role, investigating and evaluating potential defenses, judging the merits of suppression motions, advising defendant of the collateral consequences of conviction, gauging defendant's jury appeal, and assessing plea bargaining opportunities. *See* Pet. App. 15; Br. of *amicus* NACDL 6-7. For at least five reasons, the Sixth Amendment does not require a court to address counsel's substantive role for

purposes of securing a valid waiver of counsel at a guilty plea hearing.

First, in any given case a court cannot divine all substantive tasks an attorney might undertake. Indeed, the Iowa Supreme Court expected lower courts to eschew discussing specific defenses with a defendant. Pet. App. 18. Thus, at a general level the litany's only function is to take a court from its neutral role and put it in the position of encouraging representation for all *pro se* defendants pleading guilty.

Respondent's and the NACDL's position suffers from a second defect. The Sixth Amendment does not require an admonishment of the substantive value of an attorney's services in other settings – proceedings where practically speaking a defense attorney's skills may be just as or more helpful.

For example, an attorney's ability to recognize a deficient charging document or a valid defense of entrapment, coercion or defense of others, could serve a defendant well in the earliest stages of a criminal investigation. During post-indictment questioning, a skilled attorney's advice could result in a charge reduction or outright dismissal. Nevertheless, the Sixth Amendment does not require the government to advise an accused that a lawyer can better evaluate the wisdom of which questions to answer or what information it would be best to volunteer. *Compare Patterson*, 487 U.S. at 293-94 *with id.* at 307 (Stevens, J., dissenting) *with Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 165 (2000).

Third, all these substantive duties are germane to prosecutions to which the Sixth Amendment does not attach. A crime punishable only by fine is just as

susceptible to an affirmative defense or suppression issue as one punishable by incarceration. *See Scott v. Illinois*, 440 U.S. 367, 373 (1979) (holding right to counsel in state prosecution attaches where actual imprisonment results). Likewise, an OWI conviction for which no incarceration is imposed carries the same collateral consequences as a conviction resulting in jail or prison, such as license revocation or civil liability. Indeed, taken to its logical conclusion, the importance of these functions suggests no plea should be accepted but upon the advice of counsel. *See* ABA Standards for Criminal Justice, *Providing Defense Services* Std. 5-8.2(b), p. 102-06 (3rd ed. 1992). And yet, even the most demanding authorities do not *require* consultation with an attorney before entering a *pro se* guilty plea. *See* 49 Minn. Stat. Ann., R. Crim. P. 5.02(3)-(4); *see also Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942).

Fourth, the Iowa Supreme Court's warnings serve poorly the ends they seek. The warnings required below are underinclusive in the sense that they rest on the speculation that an able lawyer might find and advance a meritorious defense. Also, by declining to address specific defenses that a lawyer might discover and pursue, the court leaves a defendant actually unaware of potential defenses. Such an omission begs a discussion of the numerous complicated factual and legal defenses an accused might pursue.

The warnings are also overinclusive in the sense that they tell a defendant no more than what the public must surely know already: that defense attorneys see non-obvious defenses and advise people on the choice to plead guilty, plea bargain, or go to trial. Such a warning to all *pro se* defendants – particularly those facing simple

offenses with predictable punishments – risks a fruitless, costly delay to consult an attorney who will only confirm either defendant's initial impression of guilt or those matters discussed during the plea hearing.

Fifth, during a valid guilty plea colloquy, the court must discuss with the defendant how the elements are satisfied and it cannot accept a plea where an element, such as the requisite *mens rea*, is lacking. Such a plea lacks a factual basis and the defendant appears actually innocent. *See, e.g.*, Pet'r. Br. App. 1; J.A. 21-22; Fed. R. Crim. P. 11(b)(3). This factual basis safeguard, while endeavoring to protect the innocent, also highlights for the defendant the role an attorney could play should he or she choose to contest the charge and go to trial or enter a plea to a reduced charge.

Amicus NACDL raises the prospect that a defendant may be unaware that defense counsel can raise affirmative defenses. Br. for *amicus* NACDL 7. But these defenses by their nature concede the defendant committed the crime. 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.8(c), p. 82 (West 2nd ed. 2003). Generally speaking, a guilty plea is valid notwithstanding an affirmative defense. The question is whether a defendant can waive counsel in ignorance of a specific consequence of doing so, particularly a consequence that does not touch on actual guilt. The answer is yes.

As this Court has observed,

> [T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances – even though the defendant may

> not know the *specific detailed* consequence of invoking it. A defendant may waive his right to remain silent, his right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide.

United States v. Ruiz, 536 U.S. 622, 629-30 (2002) (emphasis in original).

Similarly, the Sixth Amendment does not mandate the litany devised below because a defendant may waive counsel in ignorance of an attorney's ability to evaluate the merits of a suppression motion. *See* Pet. App. 15 (noting a lawyer might know whether implied consent procedures or other statutory or constitutional restrictions might provide a basis for suppression of evidence); *see also* Iowa Code § 321J.6 (2003) (governing procedures by which peace officers may request breath, blood or urine samples). The plea procedure necessarily informs a defendant what evidence stands against him. How or whether that information would come in at trial is subsidiary to the decision to waive counsel and plead guilty.

This kind of decision is not anomalous. Defendants who plead guilty advised of the right to testify or remain silent may nevertheless be surprised to learn statements to witnesses or confederates may be admissible as exemptions from or exceptions to the hearsay rule. Or, a defendant may know of the right to confrontation, but incorrectly believe it prevents all incriminating statements from reaching the jurors' ears. Or, a defendant pleading guilty may be informed of the right to compulsory process,

but not that witness fees may be available easing the hardship of testifying.

The plea court in 1996 gave Tovar adequate information to decide whether to forgo plea counsel and admit guilt to first-offense OWI, an understandable, two-element offense with limited, predictable consequences. Pet'r Br. App. 1-2; Iowa Code § 321J.2(2). After Tovar explicitly stated he wished to represent himself, the court asked what ne wished to do. The court later gave Tovar two more opportunities to defer a guilty plea: once after explaining trial protections and once after discussing the elements of the offense. J.A. 9, 19, 27-28; *cf. Carter v. Illinois*, 329 U.S. 173, 177 (1946).[1]

Tovar knew the State's evidence supporting both elements of OWI; driving in Iowa and intoxication. He also knew that an attorney would have to deal with the same elements and evidence. *See* J.A. 23-24 (plea court discussing elements and evidence with Tovar). Tovar knew generally what an attorney could do for him. By making a fully informed waiver of his right to contest the State's charge with the assistance of counsel, Tovar knew he was relinquishing a professional evaluation of his case, an opinion on the wisdom of pleading guilty, and the chance to uncover a technical defense.

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[1] Respondent posits that the plea court was unaware of Tovar's intention to plead guilty at the beginning of the hearing. Resp. Br. 16. Even if true, that should not matter where the court repeatedly allows a defendant to defer pleading guilty without any admissions to that point being used against him. J.A. 9, 14, 19, 27-28.

The Iowa Supreme Court erred when it concluded the Sixth Amendment prevented use of this offense for enhancement purposes because the State had no proof of a knowing and intelligent waiver except this plea colloquy. Pet. App. 18. When a court engages a defendant in a full guilty plea colloquy, the Sixth Amendment does not require a separate admonition of the usefulness of counsel.

II. THE PLEA COURT SUFFICIENTLY ADVISED TOVAR – AND HE UNDERSTOOD – THAT COUNSEL WAS AVAILABLE.

The 1996 plea court sufficiently alerted Tovar to the availability of representation at the plea hearing. Tovar's claim to the contrary should not prevail. Resp. Br. 13, 16. The record does not support Tovar's view that he, like other first-time misdemeanants, may not have understood he had a right to plea counsel. *See* Resp. Br. 13, 15, 16.

The plea court observed "Mr. Tovar appears without counsel and I see, Mr. Tovar, that you waived application for a court appointed attorney. Did you want to represent yourself at today's hearing?" and Tovar answered "Yes, sir." J.A. 8-9. On the face of this record, the plea court is referring to some prior occasion when Tovar was advised of his right to counsel and waived that right.[2]

[2] A record of prior stages of this case, including arrest and initial appearance, are part of the 1996 trial court papers. Petitioner has informed the Clerk by letter that these records are available for the Court's review. *See* S.Ct. Rule 32(3); Letter of Petitioner's counsel to Clerk of Dec. 18, 2003.

At the very least, this exchange substantially complies with the current rule for conducting arraignments where the court must "inform the defendant of the right to counsel and ask if the defendant desires counsel; and if the defendant does, and is unable by reason of indigency to employ any, the court must appoint defense counsel." Iowa R. Crim. P. 2.8(1); *see* Resp. Br. 12 n.1 (noting substantial, not strict, compliance with rule 2.8(2)(b) for guilty pleas is required in Iowa citing, *e.g.*, *State v. Myers*, 653-N.W.2d 574, 578 (Iowa 2002); *State v. Yarborough*, 536 N.W.2d 493, 496 (Iowa Ct. App. 1995)).

By expressly declining appointed counsel, Tovar showed he actually knew he could consult with an attorney and have one present. J.A. 8-9; *see Godinez*, 509 U.S. at 401 n.12. This awareness is consistent with Tovar's later behavior at sentencing where the same judge said,

> I note that you are appearing here today without having an attorney present and you waived application for a court appointed attorney. I am sorry. You applied but it was denied due to the fact that you are dependent on your parents. Mr. Tovar, did you want to represent yourself at today's hearing or did you want to take some time to hire an attorney to represent you?
>
> THE DEFENDANT: No I will represent myself.

J.A. 46.

To be sure, the plea court did not say on the record "you have the right to an attorney here and if you cannot afford one, the court will appoint one." *See* Resp. Br. 13. Certainly on collateral review, so much is not required. To the extent any ambiguity exists on this point, it is Respondent who

bears – and has failed to carry – the burden of proof. *See Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938).

Not surprisingly, the reviewing courts below either held Tovar was advised of the right to counsel or did not address the issue. The majority opinion did not address it, instead holding the plea court failed to more fully state the advantages of counsel. Pet. App. 16, 18-19. Indeed, the litany crafted by the majority did not (contrary to Tovar's view) even mention informing a defendant of the right to appointed counsel. *See* Resp. Br. 15, 17; Pet. App. 18-19. On the other hand, the dissent, the Iowa Court of Appeals, and the Johnson County District court all concluded from the colloquy that Tovar was fully advised of his right to counsel. Pet. App. at 19, 30, 37.

Significantly, Tovar did not say at the 1996 plea hearing he wished he could have counsel. He unambiguously stated he wanted to represent himself. *See* J.A. 8-9. Nor did he suggest otherwise when the court noted he had waived court appointed counsel. *See id.*

Tovar stops short of asserting he actually was ignorant of his right to counsel. At best, Tovar posits that he – perhaps like other first-time offenders – "*may* have been under the mistaken impression" that he had a right to counsel at trial, but not at the plea. Resp. Br. 15, 16 (emphasis added). He does not state he labored under such a false impression. *Cf. Walker v. Johnston*, 312 U.S. 275, 280-82, 286 (1941) (holding *habeas* petitioner entitled to hearing on claim that he had desired counsel, was ignorant of his right to counsel, was not asked about his desire for counsel, was deceived into pleading guilty, and preferred to plead not guilty or at least consult with an attorney and was innocent). Neither has Tovar

affirmatively alleged that he desired counsel or would have delayed his plea to consult with an attorney. Nor has he alleged that the plea was defective because he was innocent or actually entitled to a defense.

Indeed, Tovar concedes the court fully complied with Iowa Rule of Criminal Procedure 8(2)(b) for entry of valid guilty pleas. *See* Resp. Br. 12. Accordingly, for purposes of this case we may assume the plea was knowing, voluntary, intelligent and factually based. Neither Respondent nor the Iowa Supreme Court has suggested the result of the plea hearing took Tovar by surprise.

Tovar offers little support for the bare assertion that first-time offenders "may have little understanding" of the right to plea counsel. Resp. Br. 15. Generally speaking, defendants have heard at the time of arrest and during post-indictment questioning about the right to counsel before making a statement, the right to counsel at an initial appearance, and the right to counsel at arraignment, and at trial. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (advisory of right to counsel at arrest); *Patterson*, 487 U.S. at 289-90 (same at post-indictment questioning); Fed. R. Crim. P. 11(b)(1)(D) (same regarding all stages); Iowa R. Crim. P. 2.8(1) (same at arraignment). Tovar's position would require a belief that in the face of these advisories, uninitiated entrants to the criminal justice system believe they may consult with an attorney only periodically; that the right to counsel attaches episodically and not when preparing for and entering the plea.

On collateral review, the Sixth Amendment permits a "presumption of regularity" to attach to prior judgments, even when the question is waiver of constitutional rights.

Parke v. Raley, 506 U.S. 20, 29 (1992) quoting *Johnson v. Zerbst*, 304 U.S. at 464, 468. First, nothing in this record diminishes the proposition that first-time offenders may comprehend the continuing right to counsel, even at a plea. Second, the 1996 district court's discussion with Tovar during plea and sentencing evinces Tovar's actual understanding that he could have an attorney present.

CONCLUSION

The Iowa Supreme Court erred in its conclusion that the Sixth Amendment required a plea court to recite a litany emphasizing the usefulness of an attorney, that a lawyer may provide an independent opinion on the wisdom of the plea, and that without defense counsel the defendant risks overlooking a defense. The modern guilty plea colloquy sufficiently alerts a defendant to the risks of confessing guilt without an attorney. The plea colloquy ensures that the *pro se* defendant's solemn admission in open court is knowing, voluntary, intelligent, and ultimately correct. This Court should agree and reverse.

Respectfully submitted,

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